IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.16 OF 1996

Municipal Corporation of Greater Bombay, Mahapalika Marg, V.T. Bombay 400 001. .. Petitioner

Versus

Subhash Kondiram More Adult, Indian Inhabitant, residing at Nand Ashish, Ground Floor, Room No.11 R-B Mehta Road, Patel Chowk Ghatkopar (East), Bombay 400 077. .. Respondent

Mr.N.V.Walawalkar for the Petitioner.

Mr.S.A.Sawant for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 22ND JULY 2004

JUDGMENT PRONOUNCED ON : 12TH AUGUST 2004

JUDGMENT :

. This Petition challenges the order dated 10th March 1995 passed by the Labour Court, Bombay in Application (IDA) No.537 of 1986 under Section 33C(2) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The claim of the Respondent workman has been allowed and the Petitioner Corporation has been directed to pay the Respondent workman an amount of Rs.57,466.50 along with costs of Rs.500/-.

2. The Respondent applied for employment as a Painter for the Teaching Aid Centre pursuant to the advertisement issued by the Petitioner on 23rd November

1971. For being appointed as a Painter, the candidate was required (i) to know painting work very well and (ii) to have experience of painting for atleast two years. The Petitioner appointed the Respondent with effect from 21st March 1972 and he was designated as a Painter. He continued to work as such and is in fact working in the same grade as Painter upto today. The Respondent workman filed an application on 21st April 1986 under Section 33C(2) of the Act claiming the pay-scale payable to an Artist. According to the Respondent, the nature of work performed by him was that of an Artist and this work was being done by him ever since his first day at work with the Petitioner. On this basis, the Respondent workman claimed that he should be paid the Artist's grade and not the grade of a Painter which was lower than the Artist's grade. The Respondent claimed this grade from 27th March 1972 onwards. The claim of the Respondent was resisted by the Petitioner by contending that the nature of work performed by the Respondent was that of a Painter and not of an Artist. According to the Petitioner, the post of an Artist required the person to pass the qualifications of G.D.A. which was a course of five years after the S.S.C. examination. The Respondent had not passed S.S.C. examination and, therefore, was not qualified to hold the post of Artist. The evidence of one Shrikrishna Mainkar from the Education Department, Teaching Aid Centre was recorded on behalf of the

Petitioner and the Respondent examined himself. The witness of the Petitioner stated that an Artist was required to do the work of art including preparing designs and layout by using his own creativity. According to this witness, the Respondent had not been asked to do any art work and, therefore, he was not entitled to the wages as claimed by him. Certain documents were placed on record issued by the office of the Senior Supervisor, Physical Instructions, Municipal Education Office. These were in the nature of certificates issued stating that the Respondent was working as a Painter in the Teaching Aid Centre of the Education Department of the Petitioner and that he had attained experience in sign-board lettering, commercial art designs, fine art, spray work and teaching aids.

3. The Labour Court after assessing the evidence on record held that since the Respondent was doing the work of an Artist, he was entitled to that grade. The Labour Court was of the view that the testimony of the Respondent that he was working as an Artist was unchallenged and that despite this request made by him, he was not given the grade of an Artist. The Labour Court, therefore, held that the Petitioner Corporation was liable to pay Rs.57,466.50 to the Respondent workman.

4. Mr.Walawalkar, learned Advocate for the

Petitioner, submits that the Labour Court while granting the application has exceeded its jurisdiction since it has decided the entitlement of the Respondent to a particular grade. According to him, this was a matter which only the Labour Court or Tribunal could decide in a Reference under Section 10 of the Act. He submits that the Supreme Court has held in several decisions that the Court exercising powers under Section 33C(2) acts like an executing Court in civil matters and, therefore, all that the Labour Court acting under Section 33C(2) can do is compute the benefit which is available to the workman. He submits that although incidental questions can also be decided by the Labour Court while computing the benefits, entitlement to a particular grade cannot be an incidental question and, therefore, the application itself was not maintainable. The learned Counsel relies on the judgments in the case of *Municipal Corporation of Delhi* vs. *Ganesh Razak and another*, **(1995) 1 SCC 235**, *Union of India* vs. *Gurbachan Singh and another*, **(1997) 5 SCC 59** and *State Bank of India* vs. *Ram Chandra Dubey and others*, **(2001) 1 SCC 73**. On merits, the learned Counsel submits that the witness of the Petitioner has not admitted that the Respondent has been continuously doing the art work but instead has delineated the nature of work which the Respondent was performing. He further submits that the Respondent did not possess the required educational qualifications to be appointed as an Artist and,

therefore, he was not entitled to that grade.

5. On the other hand, Mr.Sawant, learned Advocate for the Respondent, submits that the issue regarding the jurisdiction of the Labour Court was never raised by the Petitioner before the Labour Court in their Written Statement or at any other time. He, therefore, submits that the Petitioner ought not to be permitted to raise this issue at this belated stage in the Petition. He submits that a public body should not raise technical pleas to deny the claim of the workman by relying on the judgment of this Court in the case of *Manohar V.Barad* vs. *Union of India and others*, **2004 (3) ALL MR 266**. He submits that a learned Single Judge of this Court in the case of *Tukaram Kisan Nanaware* vs. *State of Maharashtra and another*, **1984 (1) Mh.L.J.924**, has held, in a similar set of facts, that the Labour Court under Section 33C(2) can exercise jurisdiction and compute the wages and other benefits payable to the workman. The learned Advocate submits that the evidence on record amply demonstrates that the nature of work which was performed by the Respondent was of an Artist and not of a Painter. In fact, according to the learned Advocate, the Respondent was training teachers in art work in the Teaching Aid Centre. This, according to the learned Advocate, was sufficient to prove that the Respondent was qualified enough and was, therefore, entitled to the grade claimed by him.

6. There is no doubt that the Petitioner had not raised the question regarding jurisdiction of the Labour Court or maintainability of the application in the Written Statement filed by them before the Labour Court. However, these issues have been raised in the present Writ Petition. The issue of jurisdiction is an issue which goes to the root of the matter and unless the Court has jurisdiction, no amount of consent by the parties can confer the jurisdiction on the Court. Furthermore, if the application itself was not maintainable under Section 33C(2) of the Act, the Respondent would not be entitled to the amount claimed by him. Therefore, in my view, the Petitioner can be permitted to raise the issue regarding jurisdiction and maintainability of the application even at this stage.

7. According to the submissions made on behalf of the Petitioner, the Labour Court acting under Section 33C(2) of the Act has no jurisdiction to decide the issue raised in the present application since the entire claim in the application is based on the presumption that the Respondent is entitled to a grade payable to an Artist. The submission is that unless the entitlement to this grade is proved or accepted or adjudicated upon by a Court of competent jurisdiction, the Labour Court acting under Section 33C(2) cannot compute such a claim. Reliance is placed on the judgment in the case of *Ganesh*

Razak (supra), *Union of India* (supra) as well as *State Bank of India* (supra). In *Ganesh Razak* (supra), the Supreme Court considered the earlier judgment of the Court in the case of *Central Bank of India Ltd.* vs. *P.S.Rajagopalan*, **AIR 1964 SC 743** and came to the conclusion that where the basis of a claim or the entitlement of the workmen to certain benefit is disputed, there being no earlier adjudication or recognition by the employer, the dispute relating to entitlement cannot be considered as incidental to the benefit claimed and, therefore, such a dispute is clearly outside the scope of a proceeding under Section 33C(2). In the case of *Central Bank of India* (supra), the Apex Court has held that if the workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court before proceeding to compute the benefit in terms of money. But this would not mean that only admitted claims can be decided in an application under Section 33C(2) as observed by the Court. However, the Supreme Court cautioned that although certain questions were incidental to the determination of the claim under Section 33C(2), the Labour Court cannot arrogate to itself the jurisdiction under that Section by holding that the question of entitlement is an incidental question which can be determined under Section 33C(2). The Apex Court observed that cases which legitimately fall under Section 10(1) of the Act cannot be brought within the

scope of Section 33C(2). In State Bank of India (supra), the Apex Court while examining the scope of the jurisdiction of the Labour Court under Section 33C(2) considered a case where the Central Government had made a Reference under Section 10 to adjudicate whether the termination of the services of the workmen was justified. The Tribunal passed an Award that the workmen were entitled to reinstatement. However, the Award was silent with regard to the back wages for the period between the date of termination of service and the date of reinstatement. This Award was challenged in the High Court by the Bank. The Writ Petition was dismissed. On the dismissal of the Writ Petition, the workers filed an application under Section 33C(2) for computation of the back wages on the basis of the Award. The Labour Court allowed the application and computed the amounts payable to the workmen by way of back wages. That order was challenged in a Writ Petition by the Bank in the High Court. The High Court upheld the findings of the Labour Court. Aggrieved by this order, the Bank preferred Special Leave Petition. The Apex Court, after considering some of the earlier judgments of the Court, held thus :

> "8. The principles enunciated in the decisions referred by either side can be summed up as follows :
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> . Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from

> his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to be enforced under Section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

In the case of *Gurbachan Singh* (supra), the Apex Court reiterated its decision in the case of *Ganesh Razak* (supra).

8. The case of *R.B.Bansilal Abirchand Mills Co.*

Ltd. vs. *The Labour Court, Nagpur and others*, **(1972) 1 SCC 154**, it appears has not been brought to the notice of the Court while deciding *Ganesh Razak's* case (supra). In this case, the employees of a textile mill claimed lay off compensation under Section 33C(2) of the Act. The employers raised an objection that the Labour Court had no jurisdiction to deal with the application because there had been a closure of the mills and not a lay-off as claimed by the employees. According to the employer, such a dispute could only be adjudicated by the Industrial Tribunal under Section 10(1)(d) of the Act. The Apex Court after considering its earlier judgments, held that the Labour Court could go into the matter and come to a decision as to whether there was really a closure or a lay-off. This was an incidental question which the Labour Court could decide under Section 33C(2) of the Act and the Labour Court's jurisdiction could not be decided merely by denying the claim of the workmen to computation of the benefit in terms of money. The Apex Court held that the Labour Court had the jurisdiction to decide as an incidental issue as to whether there was a lay-off or a closure and then to compute the amounts due. However, the Labour Court could not give itself jurisdiction by a wrong decision on the jurisdictional plea.

9. In the present case, the right of the Respondent workman to be paid the grade of an computation has not

been decided by any competent Court. The claim is based on the fact that the Respondent was directed to do the work which, according to him, was that of an Artist. There is a dispute as to whether in fact the work done by the Respondent could amount to doing art work. There is a further dispute as to whether the Respondent was qualified for that kind of work. The Petitioner had in no uncertain terms denied the entitlement of the Respondent to the scale of an Artist. Could it, therefore, be said that merely because the Respondent was doing the work which he claimed was that of an Artist, he should be given the grade of an Artist ? Mr.Sawant for the Respondent relies on the judgment of this Court in Tukaram Kisan Nanaware (supra). In that case, the workman was recruited as a Mukadam, but the actual work that was carried out since the date of his recruitment was clerical in nature. The workman was not paid the salary of a Clerk but that of a Mukadam. He, therefore, filed an application under Section 33C(2) of the Act claiming different of emoluments between the salary of Mukadam and a salary of the Clerk. A learned Single Judge of this Court has held thus :

> "5. .... Unchallenged position is that the petitioner has right since the inception of his recruitment been performing several duties which are primarily the duties of a clerk and unlike the duties of a mukadam. It is also a categorical finding of the Labour Court that the petitioner has been in fact performing all these duties. However, on the ground that the scope of section 33C(2) of the Act, is limited, the petitioner was denied the relief

> to which he was otherwise entitled to. I do not see any difficulty in bringing the relief claimed by the petitioner within the four corners of section 33C(2) of the Act. Though proceedings under Section 33C(2) of the Act are of a limited nature, nothing beyond this limited nature is asked for here. Claim of the petitioner that he has been doing the work and duties of a clerk has been accepted. There is also no dispute on the quantum of wages of clerk. If so, it would not be just and fair to deprive the workman of the wages legitimately due to him for duties so performed by him consistently and continuously for the entire relevant period. In a matter such as this, what is important and relevant is not any technical distinction or the nomenclature attached to the workman but the substance of the matter. And when one turns to the substance, one finds the case of the petitioner unanswerable. When in substance he has been all throughout the relevant period performing and carrying out duties of a clerk, he was in law entitled to the wages of a clerk."

10. This judgment is clearly distinguishable from the facts before me. The position in the present case that the Respondent in fact has worked as an Artist has not been accepted by the Petitioner. Therefore that position is not "unchallenged" as was the case in Tukaram Kisan Nanaware (supra). The Respondent in that case had accepted the fact that the workman was in fact doing the same duties of a Clerk and, therefore, the Court held that it would not be just and fair to deprive the workman of the wages due to him.

11. In the case of *Ajudhia Textile Mills and others* vs. *Presiding Officer, Labour Court and another*, **1990 I LLJ 218**, the Delhi High Court has held that when on

evidence the Labour Court finds that a Junior Clerk is doing the work of Chief Clerk, the workman would be entitled to the salary for the post of Chief Clerk and the monetary benefits could be computed in an application under Section 33C(2) of the Act. The learned Single Judge of the Delhi High Court by relying on the decision of the Supreme Court in the case of *Bhagwati Prasad* vs. *Delhi State Mineral Development Corp.*, **1990 I LLJ 320**, has held that such a workman would be entitled to the pay scale even if the person is not qualified to hold a particular post or is not appointed according to the Rules as long as he does the same work as the person regularly appointed on the principle of equal pay for equal work. With great respect to the learned Judge, I am unable to subscribe to this view. The decision of the Supreme Court in the case of *Bhagwati Prasad* (supra) was based on the findings arrived at by the Industrial Court in an adjudication under Section 10(1) of the Act. The powers of the Labour Court or the Industrial Tribunal under Section 10 are much wider than the powers of the Labour Court under Section 33C(2) of the Act. Unless the entitlement is accepted or adjudicated upon, the workman cannot claim the benefit of a higher grade especially if he is not adequately qualified for the higher post.

12. The Labour Court has held that since there was no Artist appointed in the Teaching Aid Centre and the

Respondent was asked to do the work which may constitute art work, he would be entitled to a grade of an Artist despite his qualification. The Petitioner Corporation has all along disputed the fact that the Respondent was in fact doing art work. Therefore, in my view, the judgment in the case of *Tukaram Kisan Nanaware* (supra) and *Ajudhia Textile Mills* (supra) are not applicable to the facts and circumstances of the present case. Furthermore, as rightly argued by Mr.Walawalkar, an Artist is required to be qualified with a G.D.A. certificate which is a five year course after passing of the S.S.C. examination. The Respondent in this case has not passed his S.S.C. examination and, therefore, could not be appointed to the grade of Artist when he sought appointment with the Petitioner. The claim filed under Section 33C(2) by the Respondent required prior adjudication or recognition of the fact that the work which Respondent was performing was that of an Artist. It is only after the entitlement to a particular grade is determined by the court of competent jurisdiction or is recognised by the employer will a claim under Section 33C(2) be maintainable.

13. For the foregoing reasons, Writ Petition allowed. However, this would not disentitle the Respondent workman from getting his claim to the Artist’s grade adjudicated upon by the appropriate forum.

14. Rule made absolute accordingly. No order as to costs.

15. Certified copy expedited.